REASONS FOR GRANTING THE PETITION

On at least six occasions in the past twenty-five years, this Court has decided a case where the existence or scope of an evidentiary privilege in federal court was deemed an important issue. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (considering attorney-client privilege); *Jaffee v. Redmond*, 518 U.S. 1 (1996) (psychotherapist-patient privilege); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (academic-peer review privilege); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (legislative privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (spousal testimonial privilege). Although in some instances in granting review the Court has noted a conflict in the courts of appeals, *see Jaffee*, 518 U.S. at 7–8; *Gillock*, 445 U.S. at 361–62, this is not always the case, *see Trammel*, 445 U.S. at 41–42. Rather, the common aspect supporting certiorari in all these cases has been that the question of privilege presented has been important. *See, e.g., Jaffee*, 518 U.S. at 8 (noting "the importance of the question"); *Upjohn Co.*, 449 U.S. at 386 ("We granted certiorari in this case to address important questions . . . ."). *See also University of Pennsylvania*, 493 U.S. at 188 (in explaining grant of certiorari, intimating that there was no true conflict in the courts of appeals, but noting "the importance of the issue"). *Compare* Sup. Ct. R. 10(c) (certiorari may be appropriate "where a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

The question presented here is sufficiently controverted and important to warrant this Court's review. Specifically, the lower federal courts would benefit substantially from a determination by this Court of whether there is in federal court a self-critical analysis privilege in the medical peer

review context. The matter is not approached uniformly in the federal courts; this is so even though a privilege exists in almost every state and has strong support in commentary on the law. These matters are developed below.

First, there is scarcely uniformity in the federal courts. Even within the courts of appeals, there is some disagreement on this discovery issue. On the one hand, the Fourth Circuit in *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001), concluded that no federal medical peer review privilege would be recognized in a racial and national origin discrimination lawsuit. Similarly, the Seventh Circuit rejected the privilege in *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), an antitrust case. And the Ninth Circuit here also found no privilege, although it implied that the result might have been different if the case had not involved an incarcerated individual. *See supra* p. 5 (quoting Pet. App. 5a).

On the other hand, the Fifth Circuit has endorsed the concept of a medical peer review privilege. Specifically, it has stated that, "[u]nlike the privilege claim for faculty tenure decisions rejected in *University of Pennsylvania v. EEOC*, as well as potential analogous claims by 'writers, publishers, musicians, [and] lawyers,' 493 U.S. at 194, the medical peer review process 'is a *sine qua non* of adequate hospital care.'" *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992) (quoting *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973)). The nature of the case meant that the court could go on to say that it "need not *define* the scope of any applicable privilege," *id.* (emphasis added), but there can be no doubt that *Harris Methodist* and the protection from discovery that it contemplates for medical peer reviews are the law within the Fifth Circuit. *See Poliner v. Texas Health Sys.*, 201 F.R.D. 437, 438 (N.D. Tex. 2001)

(suggesting that there is no federally recognized privilege per se, but citing *Harris Methodist* and on its basis limiting access in discovery to medical peer review materials).

At the district court level (the sole but significant arena for most privilege and other discovery disputes), the level of disagreement is even clearer. The leading case recognizing a self-critical analysis privilege in the medical peer review context is *Bredice*, upon which *Harris Methodist* relied. *Bredice* was a medical malpractice action in which plaintiffs sought the production of any internal evaluations prepared by the defendant hospital in connection with the death of Frank Bredice. After an in-depth consideration of the reasons for a hospital's engaging in such self-critical analysis relative to medical care, the court concluded that "[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Bredice*, 50 F.R.D. at 251. The court accordingly held that "[t]hese committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest." *Id.* It is clear that *Bredice*, though a district court decision, constitutes the law of the D.C. Circuit. *See Spinks v. Children's Hosp. Nat'l Medical Center*, 124 F.R.D. 9, 10–12 (D.D.C. 1989) (federal medical malpractice case citing *Bredice* and denying motion to compel production of minutes of morbidity and mortality conference).

Even excluding district courts encompassed within the circuit courts of appeals discussed above (the D.C., Fourth, Fifth, Seventh, and Ninth), one cannot find consistency among the district courts with respect to the qualified privilege set forth in *Bredice*. Some have concluded that a federal medical peer review privilege prevented the dis-

closure of particular information.[2] Others have ruled to the contrary, finding no federal peer review privilege.[3]

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[2] *See, e.g., Adkins v. Hospital Auth.*, 2004 U.S. Dist. LEXIS 23010 (M.D. Ga. Nov. 10, 2004) (recognizing peer review privilege for hospital documents in civil rights action brought by a physician); *Weekoty v. United States*, 30 F. Supp. 2d 1343, 1345 (D.N.M. 1998) (federal medical malpractice case citing *Bredice* and other precedents and stating that self-critical analysis privilege "has been repeatedly recognized in the context of morbidity and mortality conferences conducted by physicians"); *Utterback v. United States*, 121 F.R.D. 297, 297–300 (W.D. Ky. 1987) (finding Veterans Administration Board of Investigation memorandum reviewing surgery at issue to be protected from discovery and quoting *Bredice* in process); *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971) (federal question case quoting *Bredice* and holding that reports of hospital's board of inquiry and hospital's director investigating suicide of plaintiff's decedent were privileged). *See also Brem v. Drs. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 101–02 (D. Md. 1995) (pre-*Virmani* case in Fourth Circuit noting that court in federal-question action was not *required* to apply Maryland's statutory medical peer review privilege but, citing *Bredice* and other cases, determining nonetheless to follow state statute).

[3] *See, e.g., Nilavar v. Mercy Health System*, 210 F.R.D. 597, 601–09 (S.D. Ohio 2002) (discussing precedents at length and declaring *Bredice* not "persuasive[e]" and thus rejecting federal peer review privilege in antitrust action) (quotation at 603); *Marshall v. Spectrum Med. Group*, 198 F.R.D. 1 (D. Me. 2000) (declining under Fed. R. Evid. 501 to recognize Maine's peer review privilege in anesthesiologist's action asserting federal ADA claim and seven state law claims); *Syposs v. United States*, 179 F.R.D. 406 (W.D.N.Y. 1998) (rejecting *Bredice* and other cases and declining to recognize medical peer review privilege in Federal Tort Claims Act case), *adhered to on reconsid.*, 63 F. Supp. 2d 301 (1999); *Holland v. Muscatine Gen. Hosp.*, 971 F. Supp. 385, 390 (S.D. Iowa 1997) (stating that since "its genesis" in *Bredice* "[t]he self-critical analysis privilege [with respect to medical peer reviews] has had an ambiguous existence, neither uniformly adopted nor rejected," and declining to recognize privilege in case involving Title VII claim); *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 559–61 (S.D.N.Y. 1996) (ruling against privilege in racial discrimination lawsuit); *LeMasters v. Christ Hosp.*, 791 F. Supp. 188 (S.D. Ohio 1991) (declining to recognize privilege in sex discrimination and retaliation action).

Some of this variation can be explained by the different contexts of the cases—it is one thing, perhaps, to grant a privilege in the medical malpractice context (such as *Bredice*) and quite another to grant it in an antitrust or discrimination context. In the former instance, the concerns first enunciated in *Bredice* (that "[c]onstructive professional criticism [in retrospective care reviews] cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit," 50 F.R.D. at 250) are especially strong; in the latter instances, those concerns exist only to a lesser extent, and the information sought is not tangential but *direct* evidence of the claims themselves. In other words, in many of the cases *rejecting* a privilege the operative facts forming at least part of the bases for the claims (such as racial discrimination) are the peer review proceedings themselves.

This is not such a case, and, far more importantly for purposes of this Court's consideration, no such nuance exists in the Ninth Circuit's opinion. The Ninth Circuit was content to place great weight on the absence of an express medical peer review privilege in a federal statute (the Health Care Quality Improvement Act of 1986). *See supra* p. 5; Pet. App. 4a–5a. In fact, the court of appeals read far too much into Congress's approach. As more carefully explained by the Fourth Circuit in *Virmani*, Congress's concern in the HCQIA was in ensuring *both* that it encouraged medical peer review *and* that it did not discourage discrimination claims related to the peer review process (such as those in *Virmani*). *See Virmani*, 259 F.3d at 291–92. The latter concern does not exist at all in a case of the instant sort, where the claim is in the nature of medical malpractice—not, for example, discrimination in the peer review process—and thus the information as to which medical peer review privilege is contested is not some essential or even direct evidence of the underlying claim.

In these circumstances, it is apparent that in the HCQIA's treatment of peer reviews themselves Congress did nothing different from what it did in enacting Federal Rule of Evidence 501: it neither prescribed nor proscribed a particular privilege. It is instructive to recall briefly Congress's action with respect to this rule. In 1975, "the *proposed* provisions of the Federal Rules of Evidence governing privileges [were] rejected by Congress," *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 n.21 (1984) (emphasis added), which did not agree with the proposal of specifying nine privileges. Instead, Congress provided that "the federal courts [should] continue the *evolutionary* development of testimonial privileges . . . 'governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.'" *Trammel*, 445 U.S. at 47 (emphasis added) (quoting Fed. Rule Evid. 501). In short, "[i]n rejecting the proposed Rules and enacting Rule 501 . . . . , [Congress acted] to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis and to leave the door open to change." *Id.* (internal quotation marks and citation omitted). Against this well-known and fixed backdrop, it is unreasonable to conclude that Congress, in enacting the HCQIA in 1986 and not explicitly including a privilege in the statute, meant to *deny* any privilege. Congress had set forth its basic approach in 1975 when it enacted Rule 501 directing the courts to develop privileges on a case-by-case basis.[4]

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[4] The HCQIA formed the basis of the Ninth Circuit's "general objection" to recognizing a privilege here. Pet. App. 5a; *see supra* p. 5. The court's "particular objection"—*viz.*, "that the privilege is sought to protect a report bearing on the death of a prisoner" (Pet. App. 5a)—is rather extraordinary. The court explained its reasoning by stating that in the prison context "it is peculiarly important that the public have access to the assessment by peers of the care provided." *Id.* This suggests that the court viewed the district court's order compelling the production of the peer review document (and its affirmance of that order) as judicial

There is considerable basis in "reason and experience," Fed. R. Evid. 501, for recognizing a medical peer review privilege in particular contexts. Especially strong support for such a privilege is visible in the actions of the states, whose "policy decisions . . . bear on the question whether federal courts should recognize a new privilege." *Jaffee*, 518 U.S. at 12–13 (and cases cited). Just as in *Jaffee* the Court found the appropriateness of its decision "confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege," *id.* at 12, so, too, is it relevant here that, "[t]o encourage [medical] peer review, almost all states . . . have made the deliberations and records of medical peer review privileged from judicial disclosure." Susan O. Schuetzow, *State Medical Peer Review: High Cost But No Benefit—Is It Time for a Change?*, 25 Am. J. L. & Med. 7, 8 (1999) (advocating for changes with respect to medical peer review in certain respects). More specifically, along with the District of Columbia, 48 states have adopted a form of medical peer review privilege. *See id.* at 58–60 (appendices detailing state statutes); *see also supra* p. 3 & Pet. App. 4a (noting this of Arizona). "[T]he existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee*, 518 U.S. at 13.

Commentary on the law, also relevant in this context, *see, e.g.*, *Swidler & Berlin*, 524 U.S. at 406–07, 409 & n.4, helps to establish the reason and experience supporting the recognition of a federal medical peer review privilege. As

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equivalents of a government-in-sunshine act or open-records law, as opposed to a means of getting at the truth in the case at hand (the ordinary reason for denying a privilege). And the Ninth Circuit was entirely untroubled that its assessment of what is "peculiarly important" public policy deviated from—and undermined—the conclusion reached by the Arizona legislature when it enacted a statutory privilege for medical peer reviews.

one leading treatise puts it, there is societal value generally in promoting self-critical analysis. *See* David P. Leonard, *The New Wigmore: Selected Rules of Limited Admissibility* § 2.6.1.b, at 167–68 (2002) ("Though some courts have declined to recognize this qualified privilege, the public interest in promoting self-critical evaluation is undeniable.") (footnote omitted). For this reason, "despite the scattering of decisions, there is a core acceptance of the utility of deploying a qualified privilege for self-analysis with its insistence that its product be withheld if alternative means of proof are available . . . ." 6 *Moore's Federal Practice* § 26.48[2], at 26-170 (3d ed. 2005). This is "much preferred to an approach that would reject the privilege across the board in service of the idea of every man's evidence." *Id.*

Accordingly, the specific form of self-critical analysis privilege at issue here—that arising in the medical peer review context—"has gained widespread acceptance." *Id.* at 26-167. The cases discussed above reflect this, *see supra* pp. 8–9 & n.2, as does also the academic commentary. The latter has particularly emphasized the deleterious effect that refusals by some federal courts to recognize a federal medical peer review privilege have on state peer review statutes and privileges. *See, e.g.*, Alissa Marie Bassler, *Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege*, 39 Idaho. L. Rev. 689, 705, 712 (2003); Katherine T. Stukes, *The Medical Peer Review Privilege After* Virmani, 80 N.C. L. Rev. 1860, 1861, 1866, 1870-78 (2002). Here, then, is another instance where "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Compare Jaffee*, 518 U.S. at 13. This is especially clear here, where the Arizona Supreme Court relied heavily on *Bredice* (and the public policies it identified) in Arizona's first major opinion construing the

scope of the state's statutory peer review privilege. *See Tucson Medical Center, Inc. v. Misevech*, 113 Ariz. 34, 37–38, 545 P.2d 958, 961–62 (1976).

None of the foregoing is to suggest that the Court should announce some categorical privilege with respect to medical peer reviews. But it is equally impossible to support blanket rejections of the privilege, such as the Ninth Circuit's here. The "overwhelming public interest" in having medical peer reviews kept confidential, first identified some thirty-five years ago in *Bredice*, 50 F.R.D. at 251, and subsequently broadly recognized, supports at least a privilege or protection for retrospective incident-specific peer reviews thereafter sought in medical malpractice litigation. The matter has percolated in the lower courts for a considerable period of time, and the lack of an even broader conflict in the courts of appeals reflects not consistency, but rather the basic fact that discovery questions rarely reach the appellate process; this hardly makes them unimportant.

At bottom, there can be no doubt that the federal courts and litigants within them would benefit substantially from the Court's deciding this case. In these circumstances, deciding a case such as this would contribute to an important function of this Court; over the years, this function has played a significant role in supporting certiorari and in the formulation of resulting opinions. Consider the Court's comment at the beginning of its decision in *Upjohn Co.*:

> With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client

> privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

Upjohn Co., 449 U.S. at 386. Such an approach is the common-law responsibility that Congress has placed on the Court through Federal Rule of Evidence 501.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15466
D.C. No. CV-02-01686-JAT

CAROL ANN AGSTER, personal representative of the Estate of Charles J. Agster, III, deceased, and as surviving parent of Charles J. Agster, III; CHARLES J. AGSTER, JR., surviving parent of Charles J. Agster, III,

Plaintiffs-Appellees,

v.

MARICOPA COUNTY, a public entity;
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,

Defendants-Appellants,

and

MARICOPA COUNTY SHERIFF'S OFFICE, a division of Maricopa County; JOSEPH M. ARPAIO, Sheriff; BETTY J. LEWIS; JOHN DOE LEWIS, husband; BARUCH A. REUSCH; JANE DOE REUSCH, wife; LEAH R. COMPTON; JOHN DOE COMPTON, husband; KRISTINE KEMPER; JAMES E. CROUCH, husband, aka John Doe Kemper; AMANDA S. GARRISON; JOHN DOE GARRISON, husband; SUSAN E. FISHER; JOHN DOE FISHER, husband; ERIC NULPH; JANE DOE NULPH, wife; KATHERINA BROKSCHMIDT; CHARLES BROKSCHMIDT, husband, aka John Doe Brokschmidt; MICHAEL C. WILKINS; KATHLEEN WILKINS, wife, aka Jane Doe Wilkins; LAURA SODEMAN; JOHN DOE SODEMAN, husband,

Defendants.

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted
March 16, 2005—San Francisco, California

Filed April 28, 2005

Before: JOHN T. NOONAN, SIDNEY R. THOMAS, and RAYMOND C. FISHER, *Circuit Judges*.

Opinion by Judge Noonan.

NOONAN, *Circuit Judge*:

The parents and the representative of the estate of Charles J. Agster III (Agster) brought this action against individuals and Maricopa County and Maricopa County Sheriff's Office (collectively, the County) for the death of Agster while in the custody of the County. In this interlocutory appeal, the County challenges the order of the district court compelling production of the mortality review conducted by Correctional Health Services. We hold that we have jurisdiction to consider the County's claim of privilege, and we hold that federal law recognizes no privilege of peer review in the context of a case involving the death of a prisoner.

FACTS AND PROCEEDINGS

On August 6, 2001, Agster was arrested and taken to the county jail where he was placed in a restraint chair. His respiration decreased, and he developed an irregular heartbeat. Attempts were made to resuscitate him. He was ultimately transported to a hospital where he was placed on life support. On August 9, 2001, he was pronounced dead.

Correctional Health Services, whose employees had given medical care to Agster at the jail, was obligated to undertake a mortality review by its own policies and by Standard J-10 of the National Commission on Correctional Health Care Standards for Health Services in Jails. The review, designated as a "Critical Incident Report" was begun August 7, 2001 and finished November 8, 2001. The review was intended to be, and was, kept confidential.

On August 6, 2002, the plaintiffs brought this action in Arizona state court. On August 29, 2002, the County removed the action to the federal district court. Prior to trial, the plaintiffs sought discovery of the mortality review. The motion was opposed by the County evoking Arizona law to maintain its confidentiality. On January 30, 2002, the district court ruled "that no federal peer review has been adopted in the Ninth Circuit." The court overruled the claim of privilege and ordered the production of the document. The court declined to certify the order for interlocutory appeal.

The County appeals.

ANALYSIS

Jurisdiction. Our jurisdiction is of final judgments, 28 U.S.C. § 1291, with a gloss admitting appeal of "a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (internal quotations and citations omitted). Such decisions must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The present appeal meets these stringent conditions.

The issue of the production of the mortality review is conclusively resolved. The issue is important: the statutory grant of the claimed privilege by Arizona and other states attests to its importance. If the matter is not resolved on this appeal, the document will influence the outcome of the trial, but it will be difficult to determine the difference it made. Therefore, we find jurisdiction to decide the dispute now.

The Privilege. Arizona recognizes the privilege attached to peer review of "the professional practices within the hospital or center for the purposes of reducing morbidity and mortality and for the improvement of the care of patients provided in the institution." Ariz. Rev. Stat. §§ 36-445, 36-445.01. But we are not bound by Arizona law, and the defendants deliberately chose the federal forum to litigate this suit.

No case in this circuit has recognized the privilege. But we can create a new privilege as a matter of federal common law. A "public good transcending the normally predominant principle" disfavoring testimonial privileges may justify such creation. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (internal quotations and citation omitted). The law of privilege is not frozen. The process of recognizing one is "evolutionary." *Id.* (citation omitted). It is earnestly urged that the evolution has reached the point here that the protection of confidentiality in peer review in order to assure candor in the review has been recognized by most states. *Weekoty v. United States*, 30 F. Supp. 2d 1343, 1348 (D. N.M. 1998); Note, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C.L. Rev. 179 (1988).

We are constrained by two considerations, one general and the other particular to this case. We must be "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). The Health Care Quality Improvement Act of 1986 granted immunity to

participants in medical peer reviews, but did not privilege the report resulting from the process. *See* 42 U.S.C. §§ 11101-11152. Congress amended the act in 1987 to state that "nothing in this subchapter shall be construed as changing the liabilities or immunities under law or preempting or overriding any State law." Pub. L. No. 100-177, § 402(c). As Congress has twice had occasion and opportunity to consider the privilege and not granted it either explicitly or by implication, there exists a general objection to our doing so.

The particular objection is that the privilege is sought to protect a report bearing on the death of a prisoner. Whereas in the ordinary hospital it may be that the first object of all involved in patient case [*sic*] is the welfare of the patient, in the prison context the safety and efficiency of the prison may operate as goals affecting the care offered. In these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided. Given the demands for public accountability, which seem likely to guarantee that such reviews take place whether they are privileged or not, we are not convinced by the County's argument that such reviews will cease unless kept confidential by a federal peer review privilege. Accordingly, we are unwilling to create the privilege in this case.

The State Law Claims. Where there are federal question claims and pendent state law claims present, the federal law of privilege applies. Fed. R. Evid. 501 advisory committee note; *see also Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3rd Cir. 1982).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO: CV 02-1686-PHX-JAT

CAROL ANN AGSTER, personal representative of the Estate of CHARLES J. AGSTER, III, deceased; CHARLES J. AGSTER, JR., and CAROL ANN AGSTER, surviving parents of CHARLES J. AGSTER, III,

Plaintiffs,

v.

MARICOPA COUNTY, a Public Entity; MARICOPA COUNTY SHERIFF'S OFFICE, a division of Maricopa County; MARICOPA COUNTY DEPARTMENT OF CORRECTIONAL HEALTH SERVICES, a division of Maricopa County; JOSEPH M. ARPAIO, MARICOPA COUNTY SHERIFF; BETTY J. LEWIS, and JOHN DOE LEWIS, her husband; BARUCH A. REUSCH and JANE DOE REUSCH, his wife; LEAH R. COMPTON, and JOHN DOE COMPTON, her husband; JOHN DOES I-X and JANE DOES I-X,

Defendants.

ORDER

[Stamped "Filed Jan 30, 2004
Clerk US District Court
District of Arizona"]

Pending before this Court is Plaintiffs' Motion to Compel Discovery from Defendant Maricopa County Correctional Health Services (Doc. #199). Basically, Plaintiffs have propounded a request for production (though neither party attached a copy of the request to the pleadings relating to the motion to compel). Defendant Maricopa County Correctional

Health Services has objected to production based on privilege (though neither party attached a copy of the objection to the pleadings relating to the motion to compel), specifically a "peer review privilege." (Response, pg. 4).

The Court finds that no federal peer review privilege has been adopted in the Ninth Circuit. Accordingly, because there are federal claims in this case, the Court will overrule the objection based on federal peer review privilege.

Therefore,

IT IS ORDERED that the Motion to compel (Doc. #199) is granted to the extend [*sic*] that any objection to Plaintiffs' request for production based on federal peer review privilege is overruled.

Dated this 29 day of Jan, 2004.

/s/ James A. Teilborg
JAMES A. TEILBORG
United States District Judge

(5)

Supreme Court, U.S.
FILED
AUG 29 2005
OFFICE OF THE CLERK

No. 05-139

IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Court should create a new federal peer review privilege in a federal civil rights case when the United States Congress has twice considered the relevant competing concerns but has not created the privilege?

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IN THE

Supreme Court of the United States

No. 05-139

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Carol Ann Agster, personal representative of the Estate of Charles J. Agster, III, deceased, and as surviving parent of Charles J. Agster, III, and Charles J. Agster, Jr., surviving parent of Charles J. Agster, III (the "Agsters"), respectfully request that this Court deny Maricopa County and its Department of Correctional Health Services' Petition for a Writ of Certiorari seeking review of the unanimous decision of the Ninth Circuit Court of Appeals.

INTRODUCTION

This case involves a routine discovery dispute that is, and was, readily resolved by reference to existing law. No circuit court has recognized a federal peer review privilege, and

Congress has repeatedly declined to enact such a law. Instead of lobbying Congress to pass this law, Maricopa County is asking the federal courts to create it. This strategy is a blatant attempt to thwart the power of Congress.

Not surprisingly, the three circuit courts of appeal that have directly addressed the question of whether a federal peer review privilege exists are unanimous: ***there is no such privilege.***[1] Petitioners try to conjure up a split of authority where none exists, by pointing to a single case that addresses the topic only briefly, in *dicta*. *See United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992). And the brief mention of this issue in *Harris Methodist* inappropriately relies upon *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)—a district court decision that predates the enactment of both Federal Rule of Evidence 501 and the statutory scheme that governs the discoverability of the material sought, the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 ("HCQIA"). Petitioners' only other alleged source of support is the outdated district court decision, *Bredice*. In short, the law is not unsettled, nor is there a split among the circuits that would justify this Court's intervention.

Moreover, Congress has acted in the area of medical peer review—six times—and has declined to enact a peer review privilege of the type advocated by Petitioners. Most notably, the HCQIA of 1986 grants immunity to the participants in medical peer reviews, but not the report resulting from the process. 42 U.S.C. § 11111(a)(1); 42 U.S.C. § 11137(b)(1); Pet. App. 4a-5a. One year after its enactment, the HCQIA was amended, and Congress proclaimed that "nothing in this subchapter shall be construed as changing the liabilities or

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[1] *Agster v. Maricopa County*, 406 F.3d 1091 (9th Cir. 2005); *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981).

immunities under law or preempting or over-riding any State law." 42 U.S.C. § 11115(a); Pet. App. 5a. Accordingly, any ***creation*** of a federal peer review privilege should be left to the deliberation of Congress. And petitioner and its many lobbyist organizations should utilize the appropriate channels for creating federal legislation, by lobbying Congress.

STATEMENT OF THE CASE

This case involves a claim for wrongful death brought pursuant to 42 U.S.C. § 1983 and Arizona's wrongful death statute, A.R.S. § 12-611. Originally filed in state court, the Petitioners removed the case to federal court. The discovery at issue in this case is directly relevant to, and crucial for, the Agsters' federal civil rights claim.

Charles Agster, a mentally challenged 33 year-old man, who operated at the level of a 12 year-old, died at the hands of detention officers and correctional health personnel employed by the Maricopa County Sheriff's Office ("MCSO") and Maricopa County Correctional Health Services ("CHS"). Arrested for loitering at a convenience store, Charles laid helplessly in the intake area of the county jail until he was violently forced into a restraint chair contraption by nine MCSO jailers. Record 44, ¶¶ 36, 38, 41-43. The jailers' methods of forcing Charles into the chair compromised his ability to breathe and caused him to lose consciousness. *Id.* at ¶¶ 44-47.

In front of the jail nurse, Charles experienced a cardiac event and was found not to be breathing. The paramedics ***were not*** called. Resuscitative efforts ***were not*** started. Instead, Nurse Betty Lewis of CHS, performed an endless number of pain stimuli tests to determine if Charles was "faking it." Only after she spent five precious minutes assuring herself that Charles was in a medical emergency and not breathing were the paramedics finally notified. *Id.* at ¶ 61. By then it was too late. Though Charles' heartbeat was

eventually restored by paramedics, he had suffered such serious brain damage that he was left in a vegetative state from which he never recovered. He died two days later.

An investigation was conducted by the MCSO and CHS. The Agsters know very little of the nature or extent of it, but they do know that at least two meetings were held, the second of which was on November 20, 2001, resulting in the abrupt termination of the alleged resignation of Nurse Lewis. Nurse Lewis is, not surprisingly, vague and conveniently forgetful as to what transpired during that meeting.

The Agsters moved to compel production of the documents generated by or reviewed during these meetings and the investigation, particularly the mortality review conducted by CHS. The Agsters further moved to compel production of testimony of the participants of the November 20 meeting. Their motion was granted, the district court finding that there was no federal peer review privilege that would preclude production. Pet. App. 6a-7a.

Petitioners appealed to the Ninth Circuit. The Ninth Circuit found jurisdiction of the interlocutory appeal under the *Cohen* collateral-order doctrine.[2] The Ninth Circuit unanimously upheld the district court, and while it acknowledged its power to create a new privilege as a matter of federal common law, it chose not to, finding itself constrained by two considerations: 1) Congress' refusal to create such a privilege where it has twice "considered the relevant competing concerns but has not provided the privilege itself;" and 2) the public's right to access the assessment by peers of the care provided in prison. The demands for public accountability, the Court reasoned, likely guaranteed that the reviews would take place whether privileged or not. Pet. App. 4a-5a.

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[2] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

The evidence withheld by Petitioners is crucial to the Agsters' civil rights claim. And this case is set to begin trial on January 31, 2006. The County's Petition to this Court may prevent the Agsters from collecting this key evidence for use at trial. Accordingly, the Agsters ask the Court to deny the Petition as soon as possible, so that the case may be tried on the merits.

REASONS FOR DENYING THE PETITION

I. FEDERAL LAW DETERMINES THE QUESTION OF PRIVILEGE.

Discovery in civil actions brought in federal courts is governed by the Federal Rules of Civil Procedure. The standard for discovery under those rules is extremely broad. Rule 26(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."

Rule 501 of the Federal Rules of Evidence provides the framework for determining whether material sought in discovery is privileged. The Rule states that other than those privileges established by the Constitution, an act of Congress or Supreme Court rule, determinations of privilege are "governed by the principals of the common law as they may be interpreted by the courts of the United States in light of reason and experience . . . ." The goal, of course, is the development of a single, uniform federal law of evidentiary privileges. *Johnson v. Nyack Hospital*, 169 F.R.D. 550, 558 (S.D. N.Y. 1996).

In a federal question case, such as this, the federal common law of privilege applies—not state statutory privilege. *Breed v. United States District Court*, 542 F.2d 1114, 1115 (9th Cir. 1976). When § 1983 claims (or other federal claims) are asserted along with state law claims, federal privilege law controls the privilege issue for all claims, state and federal.

Hancock v. Hobbs, 967 F.2d 462, 467 (11th Cir. 1992) (holding that "it would be impractical to apply two different rules of privilege to the same evidence between a single jury."). Because evidentiary privileges operate to exclude relevant evidence and thus block the judicial fact-finding function, they are not favored and where recognized, must be narrowly construed. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

II. THERE IS NO RECOGNIZED FEDERAL PEER REVIEW PRIVILEGE FOR THE MATERIALS SOUGHT.

Federal courts will recognize new privileges on a case-by-case basis. *Jaffee v. Redman*, 518 U.S. 1, 8 (1996). In doing so, the courts balance the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objective underlying the privilege at issue. The court must be convinced that there is "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." 3 J. Weinstein, M. Burger, J. McLaughlin, *Weinstein's Evidence* ¶ 501.03[3] (2d ed. 2005). This balance does not often favor recognition of a new privilege unless it "promotes a sufficiently important interest to outweigh the need for probative evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). Courts are tentative about adopting proposed privileges without a historical basis.[3] 3 *Weinstein's Evidence* ¶ 501.03[6]. The peer review privilege lacks a "historical, constitutional or statutory basis" similar to that of other long-recognized priv-

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[3] *Trammel v. United States*, 445 U.S. 40, 43-44 (1980) ("The privilege claimed by petitioner [adverse spousal testimony] has ancient roots."); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (attorney-client privilege "is one of the oldest recognized privileges for confidential communications").